

Attachment A

City of Ione Comments on Draft CDO

1. There is no evidence that a Clean Water Act Permit is required for the existing or proposed discharge

The CDO includes findings that the discharge is causing groundwater degradation, that the discharge is causing seepage of degraded groundwater to Sutter Creek, and that such activity is subject to the Clean Water Act and requires a NPDES permit. In accordance with the 2003 CDO, the City has prepared the City of Ione Wastewater Master Plan and submitted a Report of Waste Discharge detailing the City's proposed improvements to address the potential groundwater degradation and the potential seepage to Sutter Creek. Those improvements include upgrading to tertiary treatment, which will eliminate the potential for the discharge to cause exceedance of MCLs for iron and manganese. Those improvements also include closing ponds 1-4 and moving ponds 5 and 6 back 200 feet from Sutter Creek, which will further reduce the potential for seepage to impact Sutter Creek.

Regional Board staff has continued to conclude that the City's Report of Waste Discharge is incomplete based on staff's position that the City has not adequately demonstrated that the proposed project will eliminate seepage of degraded groundwater to Sutter Creek. There are, however, outstanding questions about whether the facility is operating in a manner that requires a NPDES permit and whether the proposed improvements to the facility will cause a discharge that requires a NPDES permit. Thus, it is appropriate for the CDO to acknowledge this uncertainty rather than conclude that the operation is subject to a NPDES permit.

- a. It is unclear to what extent the wastewater facility is causing groundwater degradation

Documents in Regional Board's files, including those cited in staff's analysis, identify that the source of elevated iron and manganese could be occurring naturally as groundwater is impacted by formations of biological material such as peat. (Memo from Mary Boyd to Anne Olson re Excerpts and Analysis of Technical Documents from Case Files in Support of 2011 Cease and Desist Order, City of Ione WWTF, Amador County (Dec. 31, 2010).) The City's reports to the Regional Board consistently explain that iron and manganese occur naturally in the Ione formation and there are multiple potential causes of the elevated iron and manganese in groundwater. (See, e.g., Second Quarter 2007 Ione WWTP Compliance Status Report (7/25/2007).)

Moreover, as described in the City's Anti-degradation Analysis (Resolution 68-16), upgrading the treatment facility to tertiary levels will reduce any potential iron and manganese degradation that is attributable to the effluent. (Resolution 68-16 Analysis, attached as Appendix H to City of Ione WWTF Report of Waste Discharge (3/9/2010).)

- b. The available data indicate that the wastewater facility is not causing degraded groundwater to discharge to Sutter Creek

The City's Isotope Study provides evidence that wastewater is not influencing Sutter Creek water quality. The Study found that there is no isotopic difference in upstream and downstream Sutter Creek water, indicating that there is no discernable influence from the ponds on Sutter Creek isotopic composition. The study also suggests that water quality changes in Sutter Creek adjacent to the WWTF may be due to groundwater sources on the north side of Sutter Creek, while the City's facility is south of Sutter Creek. (Assessment of Movement of Wastewater from the City of Ione's Wastewater Treatment Facility into Sutter Creek; HydroFocus, Inc., Robertson-Bryan, Inc. (2/11/2011).)

At a minimum, the isotope study raises questions about the source of any water quality impact on Sutter Creek and the City requests that the CDO acknowledge the potential uncertainty and provide an opportunity for additional analysis to confirm the facility's impact on the creek.

- c. There is no precedent for application of the CWA to these facts

It is unclear what legal authority is being relied on to support the Draft CDO conclusions that seepage of degraded groundwater to Sutter Creek requires a NPDES permit. To the extent that conclusion is based on the Ninth Circuit decision in *Northern California River Watch v. City of Healdsburg* (2007) 496 F.3d 993 (*Healdsburg*), that decision is inapposite. In *Healdsburg*, the Court held that the Basalt Pond into which wastewater was discharged was a wetland subject to the Clean Water Act. The Court held, therefore, that discharge into the Basalt Pond was a discharge into a water of the U.S. In essence, then, the wastewater discharge was considered a point source, and the pond was the regulated water body. The Court did not examine whether a seepage of groundwater to a surface water is a point source subject to the Clean Water Act.

In Ione, there are no facts to support a claim that the City's ponds are wetlands or waters of the U.S. Unlike the *Healdsburg* situation, the City's ponds are not "areas that are inundated or saturated by surface or groundwater." (*Healdsburg, supra*, 496 F.3d at 997, citing 33 C.F.R. § 328.3(b) (definition of wetlands).) The City's ponds do not experience "water soak[ing] in and out of the Pond via the underground aquifer." (*Ibid.*) Unlike *Healdsburg*, there is no "underground hydraulic connection between [the pond and creek], so a change in the water level in one immediately affects the water level in the other." (*Ibid.* at 1000.) Accordingly, the Ione ponds do not have the type of hydrologic connection to the creek that the Basalt Pond had to the River and, therefore, the Ione ponds cannot be characterized as wetlands subject to Clean Water Act jurisdiction. Indeed, there are no allegations that a discharge to the pond is a discharge to a water of the U.S.

Moreover, in *Healdsburg*, in addition to concluding that the pond was a regulated wetland, the Court concluded that the pond had a significant effect on the "chemical, physical, and biological integrity of the Russian River" and, therefore, had a substantial nexus to a water of the U.S. (*Ibid.* at 1000.) Here, there is no evidence of Ione's ponds having a significant effect on the chemical, physical or biological integrity of Sutter Creek. Unlike *Healdsburg*, there is no evidence of pond water reaching the creek, and no such allegations have been made. The City's

recent isotope study indicates that pond water does not reach the creek. (Assessment of Movement of Wastewater From the City of Ione's Wastewater Treatment Facility into Sutter Creek, HydroFocus, Inc., Roberston-Bryan, Inc. (2/11/2011).) The available data do not indicate that there is a connection between the pond and the creek.

Because the Regional Board cannot support findings that the City's ponds are themselves waters of the U.S. or regulated wetlands, nor findings that the ponds have a substantial nexus to Sutter Creek, the Regional Board cannot conclude that the City's ponds are regulated by the Clean Water Act. Indeed, to date, no assertion has been made that a discharge to the City's ponds is a discharge to a regulated waterbody.

The draft CDO appears to assert that the seepage of groundwater to a regulated water body is a point source discharge subject to the Clean Water Act. There is no precedent for this conclusion. The *Healdsburg* decision did not address what constitutes a point source and there is no interpretation of *Healdsburg* that would permit a conclusion that groundwater seepage is a point source.

To the extent the draft CDO is intending to assert that the wastewater treatment facility or pond is a point source discharging to groundwater that is hydrologically connected to the creek, there is no precedent for application of the Clean Water Act under the current facts. Neither the Supreme Court nor the Ninth Circuit has determined that discharges to groundwater that are hydrologically connected to surface water are regulated under the Clean Water Act. The California District Courts that have published opinions related to this issue have not addressed similar factual situations as Ione. We are unaware of any authority that extends Clean Water Act jurisdiction to groundwater where there is no clear evidence of point source discharge of a pollutant to a water of the United States.

In light of the uncertainty regarding the cause of groundwater degradation and the impact of the facility on seepage to Sutter Creek, as well as the lack of legal precedent applicable to similar facts, the City requests that the CDO be revised to acknowledge the uncertainty and refrain from concluding that the discharge is in violation of the CWA, requiring a NPDES permit.

2. The City requests additional time to assess the impact of the City's wastewater facility on groundwater and Sutter Creek

The Draft CDO includes a deadline of August 30, 2011 to submit a Seepage Discharge Compliance Plan, which is required to specify the option selected to address seepage to Sutter Creek. As discussed above, there are a number of outstanding questions regarding the facility's impact on groundwater quality and Sutter Creek water quality, as well as outstanding legal questions regarding the application of the Clean Water Act to this operation. In order to allow sufficient time to evaluate these outstanding questions, the City requests that the deadline to submit the Seepage Discharge Compliance Plan be extended. The City's consultants are developing a scope of work to assess the outstanding issues, anticipating that this work will take up to 6 months to complete. The City, therefore, is requesting that the August 30, 2011 deadline be extended to February 29, 2012.

Future hydrologic and geochemical data collection, analysis and modeling will address three primary issues for the proposed WWTF: 1) potential effects of the WWTF on groundwater quality, 2) potential effects of the WWTF on Sutter Creek water quality and 3) possible degradation of groundwater or surface-water quality. While specific activities will be detailed in a forthcoming work plan, we herein describe the general nature of envisioned future work. Overall, we foresee a comprehensive approach that integrates regional groundwater geochemical and hydraulic data collected north and south of Sutter Creek with surface water quality and flow data and analysis. Future groundwater chemical data collection will provide information about the nature of elevated manganese and iron concentrations downgradient of the WWTF. This will include continued monitoring of these and additional constituents as well as additional data collection and analysis. These geochemical data and analysis of processes will result in an improved understanding of the sources of and processes affecting elevated groundwater manganese and iron concentrations. In coordination with the design process, these analyses and data will also lead to geochemical analysis of the planned project and development of strategies for reducing effects on groundwater quality of current and future WWTF operations.

Data for stable isotopes of hydrogen and oxygen provided evidence that the WWTF is not affecting Sutter Creek water quality. Additional data collection and analyses are required for verification of these results and determination of the source of and processes affecting observed changes in Sutter Creek water quality in the reach adjacent to the WWTF. This will include continued monitoring with the addition of constituents to help identify the source of water quality changes. Also, a groundwater flow model developed by Condor Earth Technologies will be reevaluated in light of additional data collection efforts.

3. The City requests revisions to the proposed connection ban

The City believes there is insufficient evidence to support a connection ban. In particular, the Draft CDO findings that the facility threatens to exceed disposal capacity are not supported by the evidence in the record. Moreover, as noted above, there are questions regarding the facility's impact on groundwater quality. In light of the potential to degrade groundwater quality, however, the City is willing to accept a connection restriction that permits approximately 100 new connections over the next 3 years. This represents substantially fewer connections than area developers have requested.

a. The evidence does not support that the facility threatens to exceed disposal capacity

It is important to understand that the lone wastewater treatment facility has a different disposal capacity than its treatment capacity. The treatment capacity relates to the ability of the influent flow to be adequately treated through the headworks and in Ponds 1 through 3. The flow data show that treatment flow capacity of 0.55 million gallons per day (mgd) has not been exceeded in the last 5 years. The average dry weather flow (ADWF: the average of June through September) for calendar years 2005 to 2010 ranged from 0.32 to 0.40 mgd. The draft CDO does not allege that there is any potential to exceed the treatment capacity of the facility. Disposal capacity relates to the ability of Ponds 4, 5, 6, and 7 to dispose of the flow from Pond 4 along

with the flow from the Preston Reservoir (which includes ASRA flow). The Draft CDO refers to data from 2005-2010 to conclude that the facility has the potential to exceed its disposal capacity. The Draft CDO does not account for the September 18, 2007 amendment to the agreement between the City and ARSA, reducing the allowed flows from ARSA to the City's percolation/evaporation ponds from 900 afy to 650 afy. Since this agreement was reached in 2007, disposal rates have ranged from 0.40 to 0.49 mgd on an average annual basis. This is significantly below the disposal capacity of 0.75 mgd (based on average annual flow).

- b. Allowing a small number of additional connections is critical to the City's economic ability to proceed with facility improvements

Since a limited number of additional connections will not exceed the treatment or disposal capacity and the City needs these connections to continue to generate revenue, the City requests some latitude on this issue. While the City acknowledges that the treated wastewater still needs to be disposed in the disposal ponds, the lack of conclusive evidence that the disposal ponds are affecting Sutter Creek should provide sufficient latitude for a small number of additional connections.

The City of Ione has been under a self-imposed connection restriction since 2007. The City has not authorized any new projects, but we continue to work with the projects that received prior approval to obtain the necessary sewer connections. In 2005 and 2006, the City approved two major projects that had a combined 923 units. One project, Wildflower, has not constructed any homes, but has an approved subdivision map and development agreement allowing construction of 276 homes, with 201 approved for sewer connections. The other project, Castle Oaks, has an approved subdivision map and development agreement for 647 homes, with 372 homes approved for sewer connections. There is another smaller project, Ione Oaks, which is approved to construct 37 units, with 18 units allowed to connect to the sewer system. Another project, Edgebrook, has pre-paid for all sewer connections. Edgebrook, Castle Oaks and Ione Oaks have been building homes over the past two years and Edgebrook is 98% completed. There are no new subdivision projects in process or review at this time.

In March 2008, based on existing project approvals, the City identified the need to provide wastewater services to the 1005 units that have been approved, but not connected. At that time, the City projected that its wastewater facility has current capacity to accommodate only 685 additional units. Because construction has slowed down in recent years, the City has been able to pursue wastewater facility improvements that will accommodate the approved projects without imposing a complete connection ban. In other words, the slow pace of development has allowed the City to continue connecting the small number of additional homes that have continued to be built, without threatening to exceed the current capacity of the wastewater facility.

In order to continue to accommodate the projects that have been approved, but not yet connected, the City is seeking the ability to allow 100 sewer connections, not including one for one exchange, over the next three years until activation of the new wastewater treatment facility. These additional connections will significantly benefit the City's ability to pursue the wastewater improvements because the connection fee per residence will assist with funding the project. In

addition, pursuant to the terms of the development agreements for the Castle Oaks and Wildflower projects, these connections would allow the City to provide a wastewater improvement project construction and payment schedule to Castle Oaks and Wildflower project owners, requiring the project owners to begin funding the wastewater improvement project, as a credit against sewer connection fees prior to connecting residences. The City's revenues are primarily from taxes, property and vehicle license fees, which means a vacant lot must be converted to a constructed house in order for the City to obtain the increase in property taxes.

The additional 0.02 million gallons per day based on 200 gallons per day per household average will have minimal impact on the City's wastewater treatment facility. The City would ration these units primarily to Castle Oaks due to the project continuing to build and sell houses, but would also allocate connections to any in-fill projects.

Additionally, the City has two projects that are in the building application review process and the City has not issued the building permits.

1. The first involves the demolition of a residence connected to the City's sewer collection system and new construction of a new medical clinic on the same site. The City issued the demolition permit and is in the process of reviewing the plans for the new facility. The City has not yet issued the building permit for the new construction, but has previously informed the property owner that the demolition and reconstruction does not require a new sewer connection under the City's current policies and upon issuance of the building permit there would be continued sewer service. The City is requesting clarification that the new connection ban for projects that have not already obtained a building permit does not apply to this project, because the new facility is replacing the prior residential connection, and is not a new connection. Withholding this building permit would impose a significant hardship on the property owner, who proceeded with demolition based on the understanding that sewer service would continue after reconstruction.

2. The second building permit application involves the construction of a restroom at Howard Park using grant funds. The City previously had two mobile homes located in the park, which the City disconnected from the collection system in 2008. The City has a deadline of March 31, 2011 to complete construction of the new arena restrooms based on conditions associated with the issuance of the grant funds for this project. The City has not issued the building permit yet, but has been in process of finalizing the specifications for the bid documents and released the bid documents during the week of January 21, 2011. The building is a kit that a contractor will construct and complete by March 31, 2011. The final closeout on the grant funds requires an inspection by the State Parks Department to confirm construction is complete and the State will reimburse the City for the costs per the grant. Given the immediate need to complete the project in order to utilize the grant funds and the fact that this connection replaces prior mobile home connections, the City requests clarification that it can proceed to issue a building permit for this project.

The City is aware that if a new project is seeking approval that any sewer connections are conditioned until completion of the new facility. The City has informed new project proponents that approval for new projects will have a **conditional will serve** conditioned on construction of

the wastewater improvements and assurance that the improvements provide adequate capacity to serve the proposed new projects.